Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 24-828-94
MOKHTAR SIDIN JCA
21 NOVEMBER 1996

Constitutional Law *— Right to property — Aboriginal peoples' rights over land — Compulsory acquisition of ancestral land by government — Failure of government to show right to deprive aboriginies of their land — Aborigines' rights under common law and statutory law — Whether all acquisition of proprietary rights must be compensated — Federal Constitution art 13 & Aboriginal Peoples Act 1954 s 11*

Native Law and Custom *— Land dispute — Customary rights over land — Aboriginal peoples' rights over land — Compulsory acquisition of ancestral land by government — Claim for adequate compensation for loss of land — Whether aboriginal peoples entitled to be compensated for loss of livelihood and hunting ground — Federal Constitution art 13 & Aboriginal Peoples Act 1954 s 11*

The 52 plaintiffs ('the plaintiffs') were heads of families representing a group of aboriginal people living around the Sungai Linggiu catchment area ('the Linggiu valley'). The defendants were the Government of the State of Johor and the Director of Land and Mines, Johor. The plaintiffs sought reliefs against the defendants for the following declarations:

(i) that all the lands acquired by the defendants for the purpose of constructing the Sungai Linggiu Dam near Kota Tinggi, Johor was aboriginal area or aboriginal reserve; and

(ii) that the defendants jointly or severally pay to the plaintiffs all the compensation received by them from the Government of Singapore or a sum deemed just by the court.

The plaintiffs in their affidavits claimed that the lands within the vicinity of Sungai Linggiu ('the lands') were their traditional and ancestral land and upon which they depended to forage for their livelihood in accordance with their tradition. The plaintiffs stated that the defendants had alienated the lands to the State Corporation. The defendants in their affidavits in reply did not rebut most of the allegations of the plaintiffs, except to state that the plaintiffs were not staying in the area anymore and that they were not prevented from entering the lands. The plaintiffs' counsel submitted that the rights accorded to the aboriginal people by common law and statutory law were proprietary rights within the ambit of art 13(1) of the Federal Constitution and that when these rights were taken away by the defendants, the plaintiffs should be compensated pursuant to art 13(2).

Held, allowing the application:

(1) Generally, the aboriginal peoples' common law rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. In Malaysia specifically, the aborigines' common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers (see p 430C–D, E); *Calder v A-G of British Columbia* [1973] 34 DLR (3d) 145; *Mabo & Ors v State of Queensland & Anor* (1986) 64 ALR 1; *Monarch Steamship Co Ltd v Karlshamus Oljefabriker (A/B)* [1949] AC 196; *Read v The Bishop of Lincoln* [1892] AC 644; *Worcester v State of Georgia* (1832) 6 Peters 515, 31 US 530, 8 L Ed 483; *Mitchel v United States* (1835) 9 Peters 711; *Re Southern Rhodesia* [1919] AC 211; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399; *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1980) 107 DLR (3d) 513; *Pareroultja & Ors v Tickner & Ors* (1993) 117 ALR 206 followed.

(2) Section 11 of the Aboriginal Peoples Act 1954 ('the Act') guarantees adequate compensation for land, bearing rubber or fruit trees claimed by the aboriginal people, that is alienated. It is clear that the land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access, which is a jungle reserve. As such, adequate compensation must be made for these trees but not for the land. In the present case adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look for food and produce was acquired by the government. The compensation was not for the land but for what was above the land over which the plaintiffs had a right (see p 431A–D).

(3) The plaintiffs' rights both under common law and statutory law are proprietary rights protected by art 13 of the Federal Constitution which mandates that all acquisition of proprietary rights shall be compensated (see pp 433G and 434E–F); *Rabindra Kumar v Forest Officer* AIR 1955 Manipur 49; *Selangor Pilot Association (1946) v Government of Malaysia & Anor* [1975] 2 MLJ 66; *S Kulasingam & Anor v Commissioner of Lands, Federal Territory* [1982] 1 MLJ 204 followed.

(4) The plaintiffs had established that they have proprietary rights over the Linggiu valley and that the defendants had deprived

them of these rights. Since the defendants had failed to establish the right to deprive the plaintiffs of their proprietary rights over the Linggiu valley, the deprivation without compensation was unlawful. The plaintiffs were entitled to compensation in accordance with art 13(2) (see p 434D–E).

(5) In this case, the plaintiffs had suffered deprivation of the following types of interest in the land:
(i) deprivation of heritage land;
(ii) deprivation of freedom of inhabitation or movement under art 9(2);
(iii) deprivation of produce of the forest;
(iv) deprivation of future living for himself and his immediate family; and
(v) deprivation of future living for his descendants.

As compensation, the plaintiffs were awarded the sum of RM26.5m (see p 436B–F).

Obiter:

The National Land Code 1965 does not provide for compensation of land acquired. However, the National Land Code 1965 must be read as being subservient to art 13 of the Federal Constitution and where there is no provision for compensation under statutory law, art 13(2) should be read into that statute (see p 434F).

[Bahasa Malaysia summary

Kesemua 52 plaintif ('plaintif-plaintif') adalah ketua keluarga yang mewakili sekumpulan orang asli yang menetap di sekitar kawasan tadahan Sungai Linggiu ('lembah Linggiu'). Defendan-defendan adalah Kerajaan Negeri Johor dan Pengarah Tanah dan Galian, Johor. Plaintif-plaintif memohon relief terhadap defendan-defendan untuk perisytiharan berikut:

(i) bahawa semua tanah yang diambil oleh defendan-defendan untuk tujuan mendirikan Empangan Sungai Linggiu dekat Kota Tinggi, Johor adalah kawasan asli atau simpanan asli; dan

(ii) bahawa defendan-defendan secara bersesama atau berasingan membayar kepada plaintif-plaintif segala pampasan yang diterima oleh mereka daripada Kerajaan Singapura atau suatu jumlah yang difikir adil oleh mahkamah.

Plaintif-plaintif dalam afidavit mereka menuntut bahawa tanah-tanah di sekitar Sungai Linggiu ('tanah-tanah tersebut') merupakan tanah tradisional dan tanah nenek moyang mereka dan atas mana mereka bergantung untuk mata pencarian menurut tradisi mereka. Plaintif-plaintif menyatakan bahawa defendan-defendan telah memberimilik tanah-tanah tersebut kepada Perbadanan Negeri. Dalam afidavit jawapan mereka, defendan-defendan tidak mematahkan kebanyakan daripada pengataan plaintif-plaintif, kecuali untuk menyatakan bahawa plaintif-plaintif tidak lagi tinggal di kawasan itu dan bahawa mereka

A tidak dihalang daripada memasuki tanah-tanah tersebut. Peguam plaintif-plaintif berhujah bahawa hak yang diberikan kepada orang asli oleh common law dan undang-undang statutori adalah hak keempunyaan dalam lingkungan perkara 13(1) Perlembagaan Persekutuan dan bahawa apabila hak ini dirampas oleh defendan-
B defendan, plaintif-plaintif harus dibayar pampasan menurut perkara 13(2).

Diputuskan, membenarkan rayuan:

(1) Pada umumnya, hak common law orang asli ke atas tanah
C termasuk hak untuk bergerak secara bebas di tanah mereka, tanpa sebarang bentuk gangguan atau campur tangan dan juga untuk hidup daripada hasil tanah sendiri, tetapi bukan hak kepada tanah tersebut dalam makna moden bahawa orang asli boleh memindah-hak, memajak, menyewakan tanah atau apa-apa hasil
D dalamnya kepada orang luar oleh kerana mereka telah pun menduduki tanah-tanah tersebut secara berterusan dan/atau menikmati hak tanah sejak dahulu lagi. Di Malaysia khususnya, hak common law orang asli meliputi, antara lain, hak menetap di tanah mereka sebagaimana nenek moyang mereka telah menetap dan ini bermakna bahawa generasi depan orang asli pun berhak
E kepada hak nenek moyang ini (lihat ms 430C–D, E); *Calder v A-G of British Columbia* [1973] 34 DLR (3d) 145; *Mabo & Ors v State of Queensland & Anor* (1986) 64 ALR 1; *Monarch Steamship Co Ltd v Karlshamus Oljefabriker (A/B)* [1949] AC 196; *Read v The Bishop of Lincoln* [1892] AC 644; *Worcester v State of Georgia*
F (1832) 6 Peters 515, 31 US 530, 8 L Ed 483; *Mitchel v United States* (1835) 9 Peters 711; *Re Southern Rhodesia* [1919] AC 211; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399; *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1980) 107 DLR (3d) 513 dan *Pareroultja & Ors v Tickner & Ors* (1993) 117 ALR 206 diikut.

G (2) Seksyen 11 Akta Orang Asli 1954 ('Akta tersebut') menjamin pampasan yang mencukupi untuk tanah, yang mempunyai pokok buah-buahan atau pokok getah yang dituntut oleh orang asli, yang diberimilik. Adalah jelas bahawa tanah atas mana pokok-pokok itu ditanam adalah sama ada tanah simpanan untuk orang
H asli atau suatu kawasan di mana mereka mempunyai hak akses, yang merupakan hutan simpan. Oleh itu, pampasan yang mencukupi mestilah dibayar untuk pokok-pokok ini tetapi bukan untuk tanah. Dalam kes ini, pampasan yang mencukupi atas kehilangan mata pencarian dan kawasan perburuan harus dibuat
I apabila tanah di mana plaintif-plaintif biasanya pergi untuk mendapatkan makanan dan hasil telah diambil oleh kerajaan. Pampasan bukanlah untuk tanah tetapi untuk apa yang di atas tanah itu yang merupakan hak plaintif-plaintif (lihat ms 431A–D).

(3) Hak plaintif-plaintif di bawah kedua-dua common law dan undang-undang statutori adalah hak keempunyaan yang dilindungi oleh perkara 13 Perlembagaan Persekutuan yang menetapkan bahawa semua pengambilan hak keempunyaan haruslah diberi pampasan (lihat ms 433G dan 434E–F); *Rabindra Kumar v Forest Officer* AIR 1955 Manipur 49; *Selangor Pilot Association (1946) v Government of Malaysia & Anor* [1975] 2 MLJ 66; *S Kulasingam & Anor v Commissioner of Lands, Federal Territory* [1982] 1 MLJ 204 diikut.

(4) Plaintif-plaintif telah menunjukkan bahawa mereka mempunyai hak keempunyaan ke atas lembah Linggiu dan bahawa defendan-defendan telah melucut hak mereka. Oleh kerana defendan-defendan telah gagal menunjukkan hak untuk melucutkan hak keempunyaan plaintif-plaintif ke atas lembah Linggiu, perlucutan tanpa pampasan adalah menyalahi undang-undang. Plaintif-plaintif berhak kepada pampasan menurut perkara 13(2) (lihat ms 434D–E).

(5) Dalam kes ini, plaintif-plaintif telah mengalami jenis perlucutan kepentingan dalam tanah yang berikut:
(i) perlucutan tanah warisan;
(ii) perlucutan kebebasan penghunian atau gerakan di bawah perkara 9(2);
(iii) perlucutan hasil hutan;
(iv) perlucutan kehidupan masa depan untuk diri dan keluarganya; dan
(v) perlucutan kehidupan masa depan untuk keturunannya.

Sebagai pampasan, plaintif-plaintif diawardkan jumlah sebanyak RM26.5 juta (lihat ms 436B–F).

Obiter:

Kanun Tanah Negara 1965 tidak membuat peruntukan bagi pampasan tanah yang diambil. Namun demikian, Kanun Tanah Negara 1965 harus dibaca sebagai menurut perintah perkara 13 Perlembagaan Persekutuan dan di mana tiadanya peruntukan bagi pampasan di bawah undang-undang statutori, perkara 13(2) harus dibaca ke dalam statut itu (lihat ms 434F).]

Notes

For cases on right to property, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1078–1100.

For cases on land disputes over native's customary land, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 580–610.

Cases referred to

Amodu Tijani v Secretary, Southern Nigeria [1921] 2 AC 399 (folld)
Calder v A-G of British Columbia (1973) 34 DLR (3d) 145 (folld)
Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development (1980) 107 DLR (3d) 513 (folld)

Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] 2 All ER 93 (refd)
Mabo & Ors v State of Queensland & Anor (1986) 64 ALR 1 (follld)
Mitchel v United States (1835) 9 Peters 711 (follld)
Monarch Steamship Co Ltd v Karlshamus Oljefabriker (A/B) [1949] AC 196 (follld)
Nireaha Tamaki v Baker [1901] AC 561 (refd)
Pareroultja & Ors v Tickner & Ors (1993) 117 ALR 206 (follld)
Rabindra Kumar v Forest Officer AIR 1955 Manipur 49 (follld)
Read v The Bishop of Lincoln [1892] AC 644 (follld)
Selangor Pilot Association (1946) v Government of Malaysia & Anor [1975] 2 MLJ 66 (follld)
S Kulasingam & Anor v Commissioner of Lands, Federal Territory [1982] 1 MLJ 204 (follld)
Southern Rhodesia, Re [1919] AC 211 (follld)
Vajesingji Joravarsingji v Secretary of State for India in Council (1924) LR 51 IA 357 (refd)
Worcester v State of Georgia (1832) 6 Peters 515, 31 US 530, 8 L Ed 483 (follld)

Legislation referred to

Aboriginal Peoples Act 1954 ss 6, 7, 10, 11, 12
Federal Constitution arts 4, 4(1), 8(5)(c), 13, 13(1), 13(2)
National Land Code 1965
Indian Constitution arts 19(1)(f), 31 [India]

Alim bin Abdullah (State Legal Adviser) (*Abdul Rashid Daud* with him) for the plaintiffs.
S Kanawagi and *R Rajasingam* (*Khana & Co*) for the defendant.

Cur Adv Vult

Mokhtar Sidin JCA: The 52 plaintiffs are heads of families representing a group of aboriginal people living around the Sungai Linggiu catchment area which also includes the tributary Tebak ('the Linggiu valley'). The defendants are the Government of the State of Johor and the Director of Land and Mines, Johor. The plaintiffs brought this action by way of originating summons seeking reliefs against the defendants for the following declarations:

(i) that all the lands acquired by the defendants for the purpose of constructing the Sungai Linggiu Dam near Kota Tinggi, Johor is aboriginal area or aboriginal reserve; and

(ii) that the defendants jointly or severally pay to the plaintiffs all the compensation received by them from the Government of Singapore or a sum deemed just by the honourable court.

The plaintiffs in their affidavits claimed that the lands within the vicinity of Sungai Linggiu were their 'kawasan saka' — or their traditional and ancestral land — and upon which they depended to forage for their

livelihood in accordance with their tradition. The plaintiffs stated that the defendants had alienated 53,273 acres from their 'kawasan saka' to the State Corporation by way of four titles.

The State Corporation had in turn entered into an agreement with the Government of the Republic of Singapore which, through its Public Utilities Board, had agreed to build a dam and supply water to both Singapore and the State of Johore. The plaintiffs claimed that the defendants had restricted those areas and had prohibited the plaintiffs and/or their families from entering those areas to forage them. The defendants in their affidavits in reply affirmed by En Baderi bin Dasuki, Assistant Director of Lands and Mines and En Daud bin Hj Hassan, Director, Department of the Aborginal Peoples' Affairs ('JHEOA') have not rebutted most of the allegations of the plaintiffs, except to state that the plaintiffs were not staying in the area anymore and that they were not prevented from entering the said area.

I took time to do my research and I believe that this is the first case in this country where the aboriginal people have sued the government for their traditional rights under law. As such, I have had to turn to various sources — including cases, articles and other writings both from within and outside Malaysia — to determine the plaintiffs' rights, if any.

It is established law that courts may take judicial notice of facts of history, whether past or contemporaneous: *Monarch Steamship Co Ltd v Karlshamus Oljefabriker (A/B)* [1949] AC 196; and further, the court is entitled to rely on its own historical knowledge and researches: *Read v The Bishop of Lincoln* [1892] AC 644, per Lord Halsbury at pp 652–654.

During the hearing, counsel for the plaintiffs had submitted eight booklets comprising articles by various writers, both local and foreign, and also by government agencies and non-government organizations on the subject of aboriginal matters. These booklets comprised historical, judicial as well as policy decisions of governments, including the Malaysian Government. In view of the neutral source of these articles, I am of the view that I am entitled to admit historical facts both past and contemporaneous from booklets tendered by the plaintiffs' counsel and also rely on my own research on these issues. As such, I did not ask the parties to adduce evidence by witnesses. It is to be noted that most of the issues raised by the plaintiffs before me were not disputed.

It is established from the various articles that the aboriginal people inhabiting the Linggiu valley are of the Jakun tribe and have been in inhabitation of that area from time immemorial. Prior to 1954, there was no specific authority established to take care of the affairs of the aborigines. In 1954, the British Colonial Government established the Department of the Aboriginal Peoples' Affairs. That department took over the control of administering the socio-economic welfare of the aborigines of the Federation of Malaya. In 1961, after Malaysia had gained her independence, the Federal Government, in order to eliminate the influence of communist terrorists amongst the aborigines, relocated most of the aborigines including the plaintiffs from the deep jungles to the jungle fringes where the authorities

could keep an eye on them. Since most of the aborigines were experts in jungle trekking, they were employed as guides by the police and the army. Eventually, some of them were recruited by the government to fight against communist terrorists.

However, the legal recognition of the aboriginal peoples' rights in Malaysia was first enacted in 1939 under the State of Perak Enactment No 3 of 1939. It was enacted to protect the aboriginal tribes of Perak whereby a 'protector' was appointed by the Ruler in the State Council to take charge of the aboriginal peoples' affairs. When the 1954 Aboriginal Peoples' Ordinance was re-enacted, the post of 'protector' was retained for the same purpose as the 1939 Enactment. However, in 1967 when the 1954 Ordinance was amended, the post of 'protector' was redesignated as 'the commissioner'. Currently, the Federal Government has a special department to take care of the affairs of the aborigines and to improve their living conditions. This clearly shows the government's interest in the affairs of the aborigines. The Aboriginal Peoples Ordinance 1954 was revised in 1974 ('the Act'). The Act provides for a commissioner to be appointed for the protection, well-being and advancement of the aborigines of West Malaysia.

In so far as the plaintiffs and their families are concerned, it is clear to me that the plaintiffs and their families, and also their ancestors, were the aboriginal people who lived in the Linggiu valley or, at the very least, were living in the surrounding areas. It is also established that the plaintiffs depend on the produce of the jungle in the Linggiu valley and its surrounding areas for their livelihood. The jungle produce are the fauna, flora, fruits and the animals which include land animals and water animals, like fish, crab, etc. The defendants have not denied the plaintiffs' claim that the Linggiu valley was the source of their livelihood until the jungle was cleared for the purpose of building a dam. Despite an affidavit filed by En Daud, stating that the plaintiffs were not staying in that area, from a document which was produced after an order of discovery was obtained by the plaintiffs against the defendants, it was found that the JHEOA had recommended to the State Authority that the plaintiffs' families ought to be compensated as a result of the acquisition of the land. In a letter dated 16 April 1990 addressed to Ketua Pengarah Alam Sekitar, Kementerian Sains, Teknologi dan Alam Sekitar, the JHEOA admitted that the land involved are the plaintiffs' ancestral land for which they should be compensated under ss 11 and 12 of the Act. The letter went on to recommend a compensation of a sum of RM560,535 to the plaintiffs. This letter, in my view, is an admission of the defendants' liabilities to pay compensation to the plaintiffs.

In view of the fact that the plaintiffs were the inhabitants of that area or the surrounding areas of the Linggiu valley — and which fact has not been seriously disputed by the defendants — I am of the opinion that this case was properly commenced by originating summons and no further evidence by way of witnesses is necessary to establish the plaintiffs' original inhabitation of the Linggiu valley. The learned State Legal Adviser appearing for the defendants did not seriously dispute this fact in his submission. All

this, in my opinion, go towards establishing the fact that the plaintiffs were the inhabitants of that area.

I will now proceed to examine the legal rights of the plaintiffs and their families in the Linggiu valley. As the plaintiffs' claim was one falling under common law, statutory law and our Federal Constitution, to simplify matters I propose to deal with the plaintiffs' common law and statutory law rights separately, before lastly examining these rights in relation to our Federal Constitution.

Of late, aboriginal peoples' land rights — or generally what is internationally known as native peoples' rights — has gained much recognition after the Second World War, with the establishment of the United Nations of which the UN Charter guarantees certain fundamental rights. Native rights have been greatly expounded on by the courts in Canada, New Zealand and Australia restating the colonial laws imposed on native rights over their lands. It is worth noting that these native peoples' traditional land rights are now firmly entrenched in countries that had and/or are still practising the Torrens land law — namely Canada, New Zealand and Australia — where special statutes have been enacted or tribunals set up in order for natives to claim a right over their traditional lands. In Malaysia, as we do not have special statutes or tribunals, the courts is the only forum whereby the natives can make their claim, and this case being the first of such a claim by a group of aboriginal people in Malaysia. I will now set out the plaintiffs' right under the different headings of common law, statutory law and under the Federal Constitution.

Plaintiffs' right under common law

The study of native land rights shows that common law recognizes native land rights, even in countries practising the Torrens land system where the authorities issue titles pursuant to statutory powers.

One of the earliest cases giving recognition to the aboriginal peoples' traditional land rights came from USA where US Chief Justice Marshall in the case of *Worcester v State of Georgia* (1832) 6 Peters 515, 31 US 530, 8 L Ed 483 said:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

Yet another American judge, Baldwin J, in the case of *Mitchel v United States* (1835) 9 Peters 711 expounded on native land rights further where he said:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual

A possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals ... .

The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction; B it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee-simple of the whites.

The above two US cases were approved in the Canadian *Calder*'s case and the Australian *Mabo case (No 2)* which are referred to below.

The Privy Council whose decisions have been binding on our courts C until of late, and which are now persuasive in this court, has also sounded similar opinions to the above said US decisions and held in the case of *Re Southern Rhodesia* [1918] AC 211 at pp 233–234:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages D and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case, it would make each and every person by a fictional inheritance a landed E proprietor 'richer than all his tribe'. On the other hand, there are indigenous people whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they F approximate rather to the lower than to the higher limit.

In 1921, the Privy Council confirmed the above proposition in the case of *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399. Lord Haldane at pp 409 and 410 said:

Their Lordships think that the learned Chief Justice in the judgment thus G summarized, which virtually excludes the legal reality of the community usufruct, has failed to recognize the real character of the title to land occupied by a native community. That title, as they have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any racial right in the sovereign to one which only H extends to comparatively limited rights of administrative interference. In their opinion there is no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin kings conquered Lagos or when the cession to the British Crown took place in 1861. The general words used in the treaty of cession are not in themselves to be construed as extinguishing subject rights. The original native right was a I communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances. There is, in their Lordships' opinion, no evidence which points to its having been at any time seriously disturbed or even questioned. Under these conditions, they are unable to take the view adopted by the Chief Justice and the full court.

The Privy Council has also made similar statements with regard to native rights in the New Zealand case of *Nireaha Tamaki v Baker* [1901] AC 561 and *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] 2 All ER 93 at p 98 and the Indian case of *Vajesingji Joravarsingji v Secretary of State for India in Council* (1924) LR 51 IA 357.

Of late, the Federal Court of Canada in the landmark case of *Calder v A-G of British Columbia* (1973) 34 DLR (3d) 145 accepted the above pronounced law as being the correct law when confirming native rights over their land existed and continued to exist even though there was a change in sovereignty.

This landmark case, in which six out of seven Supreme Court judges found it necessary to go into the substantial issues of native land rights, held that common law categorically recognized native rights over their land.

Judson J, with whom Martland and Ritchie JJ concurred, at p 156 said:

> Although I think that it is clear that Indian Title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was 'dependent on the goodwill of the Sovereign'.

The above case described what an 'Indian title' is, or what I would describe 'native title' to be, and it is the right of the native to continue to live on their land as their forefathers had done. Although in the general sense title denotes a document, the term 'native title' does not denote any documents but only a right acquired in law.

In another follow-up case, the Federal Court of Canada in *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1980) 107 DLR (3d) 513 at 542 held:

> ... The *Calder* decision renders untenable, in so far as Canada is concerned, the defendants' arguments that no aboriginal title exists in a settled, as distinguished from a conquered or ceded, colony and that there is no aboriginal title unless it has been recognized by statute or prerogative act of the Crown or by treaty having statutory effect.

Much nearer to us, the High Court of Australia consisting of seven judges including the Chief Justice, in the case of *Mabo & Ors v State of Queensland & Anor* (1986) 64 ALR 1 sealed the statement of law pronounced in the *Calder* case by according rights to the aboriginal peoples of the Torrens Island of Queensland and overturning two centuries of court ruling that Australia was found terra nullis, that is Australia was an uninhabited island discovered by the British, or in other words, legally not recognizing the existence and/or occupation of Australia by Australian aboriginal people.

A The *Mabo case (No 2)* decision was succinctly condensed by the Federal Court of Australia in the case of *Pareroultja & Ors v Tickner & Ors* (1993) 117 ALR 206 at p 213 where the court held:

> As mentioned earlier, *Mabo (No 2)* is authority for the proposition that the common law of Australia recognizes a form of native title which, except
B where it has been extinguished, reflects the entitlement of the indigenous inhabitants in accordance with their laws or customs to their traditional land which is preserved as native title. Native title has its origins in and is given its content by the traditional laws acknowledged by, and the traditional customs observed by, the indigenous inhabitants of the territory. The nature of native title must be ascertained by reference to the traditional laws and
C customs of the indigenous inhabitants of the land. Native title does not have the customary incidents of common law title to land, but it is recognized by the common law. It may not be alienated under the common law. If a group of aboriginal people substantially maintains its traditional connection with the land by acknowledging the laws and observing the customs of the group, the traditional native title of the group to the land continues to exist. Once
D the traditional acknowledgment of the laws and observance of the customs of the group ceases, the foundation of native title to the land expires and the title of the Crown becomes a full beneficial title.
>
> The possession of land under native title may be protected by representative action brought on behalf of the people concerned. ....

E Though the judgment in the *Mabo case (No 2)* reflected differences in opinion among the seven judges on some issues, yet on others it reflected variance on emphasis, and that decision is an authority for the proposition that native rights over their land existed and is recognized by the common law of Australia. Consequentially, the Australian Parliament enacted 'The Native Title Act' just before Christmas 1990, which came into effect on
F 1 January 1994, creating the mechanism for Australian natives to claim their traditional and ancestral lands.

The question now is whether the plaintiffs have any rights over their traditional and ancestral lands. For this purpose, it is better for me to trace the plaintiffs' historical claim on the said land.

G It is not disputed that traditionally, Peninsular Malaysia was occupied by two groups of people; namely, the Malays who lived along the coast and the rivers and the aboriginal people who lived in the interiors or locally known as the 'Ulus', each group occupying their own areas of spheres and living in harmony. Within the Malay Peninsula were found the
H Malay Sultanates and, within the Malay Sultanates, some areas were occupied by the aboriginal peoples without any disputes as to their occupation of their lands. Land disputes in this part of the world began with the coming of the Europeans. The British introduced their system of government and administration which included the demarcation of lands.

I The British introduced the Torrens land system, which introduced alienation and title for the first time. This system brought within it all the people except the aborigines who continued to live in the jungle and roamed freely and sheltered wherever they wanted. These people continue to live from the produce of the jungle and the jungles are still their hunting

grounds. Before the introduction of the Torrens land system, these lands were unclaimed land in the present sense but were 'kawasan saka' to the aboriginal people. On the introduction of the Torrens land system, all the kawasan saka became state land but the aboriginal people were given the freedom to roam about these lands and harvest the fruits of the jungle. Some of these lands have been gazetted as forest reserves. The plaintiffs, however, continue to live and/or depend upon this unalienated land. It was not denied that some of them had lived on these lands, and all of them still consider the jungle as their domain to hunt and extract the produce of the jungle just like their forefathers had done.

My view is that, and I get support from the decision of *Calder*'s case and *Mabo*'s case, the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. I believe this is a common law right which the natives have and which the Canadian and Australian courts have described as native titles and particularly the judgment of Judson J in the *Calder* case at p 156 where His Lordship said the rights and which rights include '... the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished ...'. I would agree with this ratio and rule that in Malaysia the aborigines' common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.

Statutory rights

Recognizing these rights of the aboriginal people, the government enacted the Aboriginal Peoples Act 1939 which is 'an enactment for the protection of the aboriginal tribes of Perak'. In the same year, this enactment was extended to the states of Selangor, Negeri Sembilan and Pahang which were then known as the Federated Malay States. The Aboriginal Peoples Act was amended in 1954, 1967 and lastly in 1974.

Sections 6 and 7 of the Act specifically provide for the creation of special areas exclusively for the aboriginal peoples of Malaya, either as a reserve land or for the right to collect the produce of the jungle and to be used as hunting grounds. By virtue of s 10, the rights of the aboriginal peoples to occupy and/or collect forest produce overrides Malay reserve land, forest reserve or game reserve. Section 10 reflects the legislature's intention to allow the aboriginal people to lead the type of life they have always led, which has been nomadic and always looking for greener pastures. Under s 11, the State Authority must pay compensation when acquiring by alienation or leasing any land upon which are fruit and rubber trees claimed by the aboriginal people.

These people live from the hunting of animals in the jungle and the collection of jungle produce. Those are the only source of their livelihood

and income. Can these rights be taken away by the government without compensation? At a glance this could be done, but upon looking further and deeper, it is my opinion that compensation ought to be made. This can be discerned from s 11 of the Act, which guarantees adequate compensation for land, bearing rubber or fruit trees claimed by the aboriginal people, that is alienated. It is clear to me that the land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access, which is a jungle reserve. In the first case, there is no problem because it is their reserved land. In the second case, it is clear that the land belongs to the state but they were planted by the aborigines. As such, adequate compensation must be made for these trees but not for the land. In the present case, I am of the view that adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look for food and produce was acquired by the government. The compensation is not for the land but for what is above the land over which the plaintiffs have a right.

The Act does not limit the aborigines' rights therein. In order to determine the extent of aboriginal peoples' full rights under law, their rights under common law and statute has to be looked at conjunctively, for both these rights are complementary, and the Act does not extinguish the rights enjoyed by the aboriginal people under common law.

Constitutional rights of the aboriginal peoples

When Malaysia gained its independence on 31 August 1957, the Federal Constitution became the supreme law of the country. See art 4 of the Federal Constitution. All laws passed after independence day, which are inconsistent with the Federal Constitution, are void to the extent of the inconsistency.

Article 4 (1) provides:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Under the Federal Constitution, the aboriginal people of Malaysia enjoyed a special position. This is found in art 8(5)(c):

> (5) This Article does not invalidate or prohibit:
>
> (c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service.

The plaintiffs' counsel submitted that the rights accorded to the aboriginal people by common law and statutory law are proprietary rights within the ambit of art 13(1) of the Federal Constitution and there is no law to take away these rights without due compensation. The plaintiffs' counsel further submitted that the act of the defendants in taking away the traditional and ancestral funds from the plaintiffs without compensation is unlawful.

However, we need not go into the common law on compensation for our Federal Constitution art 13 covers that situation. A

Article 13 states:

13 Rights to property

(1) No person shall be deprived of property save in accordance with law. B

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

The plaintiffs' counsel submitted that the rights accorded to the aboriginal people by common law and statutory law are proprietary rights within the ambit of art 13(1) of the Federal Constitution and that when these rights are taken away by the defendants, the plaintiffs should be compensated pursuant to art 13(2). C

To answer this question, we have to determine whether the rights accorded to the plaintiffs under common law and statutory law as described earlier are proprietary rights protected by art 13(1), or in other words, do the rights accorded to the plaintiffs fall within the ambit of art 13(1), and which is to be adequately compensated by art 13(2) if compulsorily acquired or used. D

The word 'property' appearing in art 13(1) is a legal word and should be accorded its legal meaning. There is a similar provision to our art 13 in the Indian Constitution arts 19(1)(f) and 31. There are numerous Indian constitutional cases which have defined the word 'property' and I rely on the case of *Rabindra Kumar v Forest Officer* AIR 1955 Manipur 49 at pp 53–54 which eloquently sets out the meaning of the word 'property' as used in a constitutional context: E

> It has been contended that the petitioner cannot seek any relief under arts 19(1)(f) and 31 of the Constitution for his 'property' right has not been infringed at all. The argument is that the lease dated 24 February 1955, is not a completed contract and it is only a permit and so the petitioner did not acquire any property through it. F
>
> I think this contention of the respondents has no force. The words 'property' has been explained in Corpus Juris, Vol 73 p 136 as follows: G
>
> > 'In legal usage "property" is perhaps the comprehensive word which can be employed and it may signify either the subject matter in which interest exists or it may signify valuable rights and interests protected by law or it may signify both. It is generally recognized that property includes certain rights such as the right of acquisition, possession, use, enjoyment and disposition. H
> >
> > In legal usage, the word property is a generic term. According to the authorities on this question it is a term of broad and extensive application and it is also a term of large import with the very broadest and most extensive signification. It is a very comprehensive word having broad and comprehensive and exceedingly complex meanings and is perhaps the most comprehensive of all the terms that can be used. I
> >
> > The word property includes both real and personal property and ordinarily will be construed as meaning both real and personal property. It includes both intangible rights and physical things.

A In the strict legal sense, the word property signifies valuable rights or interests protected by law and this is the primary appropriate and broader signification of the term. In modern legal system, property includes practically all valuable rights, the term being indicative and descriptive of every possible interest which a person can have in any and every thing that is the subject of ownership by man and including B every valuable interests, it can be enjoyed as property and recognized as such equitable interests as well as legal interests and extending to every species of valuable rights or interests in either real or personal property or in easements, franchises and incorporal hereditaments.

The term comprises also all rights which are incidental to the use, enjoyment and disposition of intangible things, the bare possession, C with colour or right of anything of value, the right to be protected in one's possession of a thing or in one's privileges belonging to him as an individual or secured to him as a member for the Commonwealth including the right to contest judicially any invasion of that which one possesses or owns.

The property may reasonable be construed to include obligation D rights and other intangible and physical things and thus the word "property" means not only the thing but also the rights in the physical and corporeal thing which are created and sanctioned by law.

It is generally recognized that property includes the right of acquisition, the right of dominion, the right of possession, the right of use and enjoyment, the right of exclusion and the right of disposition.' E

The Federal Court in the case of *Selangor Pilot Association (1946) v Government of Malaysia & Anor* [1975] 2 MLJ 66 at p 69, per Suffian LP said:

> The language of our art 13 is not identical with, but it certainly approximates F to, the language of the Indian art 31 before the 1955 amendment which added the new cl (2A). The absence of a similar clause from our art 13 persuades me to adopt the construction placed on the Indian article by the Indian Supreme Court on the unamended art 31.

I would therefore agree with the wide interpretation given to proprietary G rights under art 13 and hold that the plaintiffs' rights both under common law and statutory law are proprietary rights protected by art 13 of the Federal Constitution.

I will now proceed to examine whether the plaintiffs were deprived of proprietary rights protected by the Federal Constitution art 13(1).

H At the time the defendants entered into an agreement with the Government of the Republic of Singapore and built a dam in the Linggiu Valley, the plaintiffs' rights of free access into Linggiu valley and to harvest the fruits of the jungle were unchallenged and recognized in law. It is the building of the dam that brought the plaintiffs' freedom of movement within the Linggiu valley, which is guaranteed by the Federal Constitution I art 9(2), to an end and subsequently extinguished the plaintiffs' rights to collect the forest produce which are recognized at common law and statutory law.

The plaintiffs' statement that the forest was a source of their livelihood was not rebutted by the defendants and neither was there evidence that

there was a break in the continuous occupation and traditional connection in the land for their livelihoods. A

It has been long recognized under our law that when a person is deprived of any proprietary right under an executive exercise pursuant to powers given by statute, that person must be compensated.

Hashim Yeop Sani J (as he was then) in the case of *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 at p 206 said: B

> Article 13(1) in my opinion ensures the sanctity of private property. That clause guarantees the right of any person not to be deprived of his property save in accordance with law which simply means that no one can be deprived of his property merely on the orders of the executive but that he may be deprived of his property only in accordance with law... . C

I agree with his Lordship.

The plaintiffs have established that they have proprietary rights over the Linggiu valley and that the defendants have deprived them of these rights. It was then up to the defendants to show that they had the right to deprive the plaintiffs of such rights. The defendants have failed to do so. D

Since the defendants have failed to establish the right to deprive the plaintiffs of their rights, I will hold that this deprivation without compensation was unlawful. I therefore hold that the plaintiffs are entitled to the compensation in accordance with art 13(2). E

The Federal Constitution art 13 supersedes both statutory law and common law and mandates that all acquisition of proprietary rights shall be compensated and that any law made for the compulsory acquisition or use of property without compensation shall be rendered void in accordance with art 4 of the Federal Constitution. I assume that the alienation of the Linggiu valley lands in four titles was done under the National Land Code 1965 but the National Land Code 1965 does not provide for compensation of land acquired. However, the National Land Code 1965 must be read as being subservient to art 13 of the Federal Constitution and where there is no provision for compensation under statutory law, art 13(2) should be read into that statute. F G

Compensation

To understand the plaintiffs' claim, one has to find out the legal meaning of the word 'compensation' which is what the plaintiffs are claiming. 12 *Halsbury's Laws* (4th Ed) at para 1123 throws some light on the meaning of the word 'compensation': H

> Meaning of 'compensation': In the sense in which the term is usually used, 'compensation' may be defined as the pecuniary recompense which a person is entitled to receive in respect of damage or loss which he has suffered, other than as a result of an actionable wrong, litigated in the civil court, committed by the person bound to make the recompense. In this sense, 'compensation' is distinct from 'damages' which are recoverable in respect of actionable wrong. The two main classes of compensation consist of I

payment by public authorities in respect of land or other property lawfully acquired under statutory powers or injuriously affected by or under statutory provisions, and payments by government departments or statutory bodies is respect of damage to property or personal injuries; but there are many examples of compensation; both in relation to interests in land and in other connections which fall outside these two classes.

We now come to the difficult part of this judgment as to how to decide on the compensation for proprietary rights taken away from the plaintiffs as there is no precedent and/or method of arriving at a formula for a just sum to be compensated.

After the *Mabo case (No 2)*, the Federal Government of Australia enacted 'The Native Title Act' to compensate the Australian aborigines for lands taken away from them and for a lack of a proper formula, the Australian Federal Legislature simply stated that compensation must be on 'just terms'. In my view, 'compensation' on 'just terms' in our context means 'adequate compensation'.

As a starting point, I would look at the compensation given by the Singapore Government to the Johore Government which was RM320m. However, even though the Singapore Government parted with RM320m the Singapore Government did not receive title in the form of freehold or leasehold and neither did the Singapore Government obtain possession of the land. Further, the Singapore Government have to incur expenses in that they have to build the dam at their own cost and hand it over to the Johore Government upon completion. As such, the compensation paid by the Singapore Government to the Johore Government was purely for loss of use or loss of revenue by the Johore Government on what is above the land and not the land itself.

In awarding compensation under the Land Acquisition Act 1960 for titled lands, the court applies the similar compensable interest test or, in other words, the court compensates a land at its market value. However, the same test cannot be applied for native title land, for the native land is a far cry from a titled land, in that a native title land cannot be sold, conveyed, leased, charged, mortgaged, etc as distinct from titled land. On the other hand, where a member of other societies of the Malaysian communities is deprived of their property under the law, he must be adequately compensated and with that compensation he is able to restart elsewhere by buying another property and/or by relocating himself. An aborigine will not be in the same category as the other Malaysian citizen, for an aborigine has special attachment to his land and without any skill, education or way to live as the other communities, he would find it very difficult, if not impossible, to relocate himself and start afresh. Therefore, it would not be appropriate to place a value to a land under the two categories of titled land and native land. Yet, for the purposes of record, counsel for the defendants informed the court, when inquired, that land around Kota Tinggi, a town within the proximity of the Linggiu valley would fetch about RM75,000 an acre. I would accept the market value, if at all there is a market value for land use in the Linggiu valley, not involving title, to be equivalent to the sum paid by the Singapore

Government to the Johore Government, ie RM6,000 per acre (round figure). However, this sum of RM6,000 per acre would involve deprivation of land use for a person for no special attachment to the land and upon which land he does not depend on for his livelihood. For a case involving the plaintiffs, I would state that the plaintiffs had suffered deprivation of the following types of interest in the land:

(1) deprivation of heritage land;

(2) deprivation of freedom of inhabitation or movement under art 9(2);

(3) deprivation of produce of the forest;

(4) deprivation of future living for himself and his immediate family; and

(5) deprivation of future living for his descendants.

For want of a yardstick, I would compute the sums for the above deprivations commencing on the same rate the Singapore Government paid the Johore Government at RM6,000 per acre multiplied by two amounting to RM12,000 per acre for loss of land used based on the above. This would be the maximum sum I would award to the plaintiffs. However, I must bear in mind that in making this award I am only giving a monetary equivalent to the loss of land use and the land produce. The sentimental, cultural and heritage attachment is not objectively achievable for that is a subjective matter. In awarding the compensation, I have in my mind that the sum would not only reflect a just figure, but also be a sum which would enable the plaintiffs to put into good use and regenerate.

Taking into consideration all the circumstances, I would make an award of RM500 per acre. This figure of RM500 per acre multiplied by the total area of 53,000 acres (to the nearest thousand acres) would amount to RM26.5m and which is what the plaintiffs are entitled to. Another method of computing the compensation is by counting the heads of the aborigines in the Linggiu valley and the surrounding areas which have their sources of income and livelihood destroyed with the acquisition of that land. The latest statistic shows there are 424 aborigines in that area. This statistic was not seriously challenged by the defendants. It was submitted by the plaintiffs and not denied by the defendants that the par capita income of poverty line at the time of the acquisition is slightly above RM300 per month per person. I will take that as the loss of income of each aborigine. I will award compensation of loss of income for 25 years for each person. On calculation, the total loss of income of the aborigines is RM26.5m and which is the same as the other compensation.

I now grant order in terms of the plaintiffs' prayer (2) and order that the defendants pay the plaintiffs the sum of RM26.5m. Parties are at liberty to apply. No order as to costs. In parting, it is my sincere hope that the plaintiffs would make good use of the compensation awarded so that they and their families would be able to survive for generations to come.

Application allowed.

Reported by Loo Lai Mee